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No. 75-114

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM MICHAEL SHAHANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that certain comments made by a juror revealed such bias that he was denied a fair trial.

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of having imported marihuana, in violation of 21 U.S.C. 952(a) and 960(a)(1). He was sentenced to two years' confinement in a jail or treatment-type institution, with one month to be served; execution of the remainder of the sentence was suspended and petitioner was placed on probation for three years. The court of appeals affirmed (Pet. App. A-1—A-12).

1. On April 3, 1973, a United States Customs inspector opened a package mailed from Sinaloa, Mexico, and destined for Glenburn, North Dakota, at the customs clearing house in El Paso, Texas (Tr. 51, 53, 59, 61-62). He found inside a wrapped cardboard box containing, among other things, two one-quart jars of a liquid substance, later identified as liquid marihuana or liquid hashish (Tr. 54, 102). On April 20, 1973, the package was delivered as addressed (Tr. 69-73). Following the delivery, the package was seized pursuant to a warrant (Tr. 73). One of petitioner's palm prints was found on the inner cardboard box, and his fingerprint was discovered on the inner wrapper (Tr. 172). It was also determined that petitioner had written the delivery and return addresses on the outer wrapper (Tr. 181).

2. The trial court conducted the *voir dire* examination of prospective jurors, and the attorneys representing petitioner neither objected to the form or wording of the questions put to the panel nor asked any supplemental questions (Pet. App. A-11). One of the areas inquired into by the court concerned the possible bias of members of the panel due to the nature of the offense charged in the indictment.[1] None of the prospective jurors indicated at that time that they would be unable to render a fair and impartial verdict in petitioner's case or would have difficulty abiding by the court's instructions.

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[1]The court questioned propective jurors as a group concerning their possible bias as follows (Tr. 23-25):

> Do any of you know of any reason why you might be prejudiced for or against the Government or for or against the Defendant in this matter?
>
> (No response.)
>
> Now this particular case is one involving what we call a controlled substance. Do any of you have any strong feelings which would affect your capacity to serve as a fair, impartial juror and which are centered around marihuana or any of the other drugs?
>
> (No response).
>
> Do you have a lack of objectivity in that area?
>
> (No response.)
>
> You have been told that the charge against Mr. Shahane is the importation of marihuana, liquid hashish, from New Mexico—correction—from Mexico to North Dakota. Now do any of you feel that you can carry forward the concept of the presumption of innocence—that is, the problem that the Government must prove beyond a reasonable doubt—can you carry forward the presumption of innocence as easily in this case as if he were charged with some other offense that you might feel was more or less serious? For example, a minor speeding matter. Do you think that the nature of the charge itself is going to make it difficult for you to handle the facts and the evidence fairly and impartially?
>
> (No response.)
>
> I take it that you can handle the facts and the evidence impartially.
>
> Now do any of you have any belief or any opinion that the offense of which this Defendant is charged is unique in any respect in the sense that it should be pursued with extraordinary vigor or it shouldn't constitute an offense at all, or that it might carry a penalty which you would consider was improper?
>
> (No response.)
>
> Do any of you have any bias arising in that kind of thinking?
>
> (No response.)
>
> If you were the United States Attorney charged with the responsibility for prosecuting the case or if you were the Defendant's attorney charged with the responsiblity of defending the case, is there something which you as a juror should disclose to that attorney so that the attorney can make

At the close of evidence, but before the case had been sent to the jury, the court informed counsel that he had received third or fourth-hand information that one of the jurors, Blanche Burtman, had stated to a prospective juror who had not ultimately been chosen to serve on the jury that she did not like long-haired attorneys or sympathize with those who used marihuana (Tr. 207-208). The court suggested that it

would be preferable not to question juror Burtman at that time and to proceed with the case (Tr. 208-209). Petitioner's attorneys complied without objection (Tr. 210-212).

Following the verdict, petitioner moved for a new trial, charging bias on the part of juror Burtman. At the hearing held on this motion, Barbara Aasen testified that during the *voir dire* examination of prospective jurors, juror Burtman had told her that "she [Mrs. Burtman] didn't sympathize with anyone using marihuana" and that "she didn't have any time for long-haired lawyers" (H. 6-8).[2] The latter comment apparently referred to one of petitioner's attorneys. Mrs. Aasen further testified that juror Burtman had stated that she had not understood some of the court's questions and that she should have said something (*e.g.*, H. 7). Mrs Aasen also testified that she had been reluctant to relay these comments to the court for the following reasons (H. 11-12):

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an objective decision as to whether you could be a fair juror?

(No response.)

If you are selected to sit in this case, would you be unable or unwilling to render a verdict solely on the evidence presented on the trial and the law as I give it to you in my instructions?

(No response.)

Would you be able to disregard any other ideas, notions or beliefs about the law you might have or you might have encountered in the course of reaching your verdict?

(No response.)

Can any of you think of any other matter which you should call to this Court's attention which may have some bearing on your qualifications as a juror? Or which might prevent your rendering a fair, impartial verdict based on the evidence and on my instructions?

[2]"H." refers to the transcript of the hearing held in connection with petitioner's motion for a new trial.

* * * I just didn't want it that I walk out of the courtroom and tell everything that I hear, you know, and on such a case as this, I felt that everyone has definite opinions about a drug charge and I didn't—just because you have opinions doesn't mean that you can't be an unbiased juror. I thought that everyone has opinions and I, too, have opinions on drugs, and maybe I should have spoken up, you know. And I know people who have taken drugs. I know about it. But I didn't say anything either, and I just felt that maybe that lady, even though she was—had biased opinions, she could still listen to the case and could give an unbiased opinion.[3]

3. Petitioner contends that the trial court erred in denying his motion for a new trial because of bias on the part of juror Burtman. Accepting for present purposes that juror Burtman had negative attitudes toward drug users and persons with long hair, however, those facts would not have warranted the trial court's granting petitioner a new trial in the absence of evidence that those attitudes interfered with her ability to render a fair and impartial verdict. It is a rare case indeed in which jurors are without opinions concerning the crimes of which a criminal defendant stands accused, but the presence of those opinions is not of itself a disqualifying factor. As the trial court properly observed in this case (Tr. 241-242), the burden of establishing prejudice interfering with an impartial verdict rested with the defense. See, *e.g.*, *Swain* v. *Alabama*, 380 U.S. 202,

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[3]Mrs. Aasen also testified that, in making the comments in question, juror Burtman had not been particularly emphatic and had not stated that because of her opinions she would be unable to render an impartial verdict in petitioner's case (*e.g.*, H. 8, 15). Nor did juror Burtman express any opinion to Mrs. Aasen concerning petitioner's guilt or innocence of the charges contained in the indictment (*e.g.*, H. 8-9).

226; *Frazier* v. *United States,* 335 U.S. 497, 503; see also *Irvin* v. *Dowd,* 366 U.S. 717; *Geagan* v. *Gavin,* 292 F.2d 244, 249 (C.A. 1), certiorari denied, 370 U.S. 903. Petitioner failed to carry that burden, and his motion for a new trial was properly denied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.